

NTSB Order No. EA-3949

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of July, 1993

Dockets SE-11755
and SE-11888

The respondents, pro se, have appealed the order of Administrative Law Judge Jerrell R. Davis dated July 22, 1991, granting the Administrator's motion for summary judgment, canceling the hearing, and terminating this consolidated proceeding.¹ By that order, the law judge also affirmed the Administrator's orders revoking respondents' airman certificates

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on allegations of violations of the provisions of Section 609(c) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1429 (FAAct),² and the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 61 and 91 (regarding respondent Olsen's airline transport pilot certificate, flight engineer certificate, mechanic certificate, and instructor certificate)³ and Part 65 (regarding

²Section 609(c) of the Federal Aviation Act provides in pertinent part as follows:

"SEC. 609...Transportation, distribution and other activities relating to controlled substances.

(c)(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person acted as an airman, or was on board such aircraft, in connection with the commission of the offense or the facilitation of the commission of the offense. The Administrator shall have no authority under this paragraph to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

(2) The Administrator shall issue an order revoking the airman certificates of any person if the Administrator determines that (A) such person knowingly engaged in an activity that is punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than any law relating to simple possession of a controlled substance), (B) an aircraft was used to carry out such activity or to facilitate such activity, and (C) such person served as an airman, or was on board such aircraft, in connection with such activity or the facilitation of such activity...."

³Respondent Olsen was alleged to have violated Section 609 (c)(1), see footnote 2, supra, and FAR §§ 91.12(a) and 61.15, which provided at the time of the offenses as follows:

respondent Nelson's mechanic and flight engineer certificates).⁴

According to the allegations contained in the Administrator's complaints, respondents were convicted, pursuant to their guilty pleas, of violations of 21 U.S.C. 963, because of their conspiracy to import cocaine into the United States. The Administrator's complaints further alleged that both respondents utilized their airman certificates in the facilitation of the

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"§ 91.12 Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.

§ 61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for-

(1) Denial of an application for any certificate or rating issued under this Part for a period of up to 1 year after the date of final conviction; or

(2) Suspension or revocation of any certificate or rating issued under this part.

(b) The commission of an act prohibited by § 91.11(a) or § 91.12(a) of this chapter is grounds for-

(1) Denial of an application for a certificate or rating issued under this part for a period of up to 1 year after the date of that act; or

(2) Suspension or revocation of any certificate or rating issued under this part."

⁴Respondent Nelson was alleged to have violated Sections 609(c)(1) and (c)(2), see footnote 2, supra, and FAR § 65.12, which is identical in its provisions to FAR §61.15, as set forth in footnote 3, supra, but applicable to those airmen holding certificates under Part 65, including mechanics and repairmen.

conspiracy and that, as a result, they lacked the care, judgment, and responsibility to hold their respective airman certificates.⁵

The law judge granted summary judgment on the basis of the indictment against respondents and sworn deposition testimony of an unindicted co-conspirator.⁶ Both respondents pleaded guilty

⁵The notice of proposed certificate action (NOPCA) dated February 21, 1991, and the order dated May 9, 1991, which was filed as the complaint against respondent Nelson, failed to specifically allege that, as a result of his conviction to conspire to import cocaine with use of an aircraft, he lacked the qualifications to hold an airman certificate. The order was amended by the Administrator on May 24, 1991 to add this allegation. Respondent contends that the law judge erred in permitting the Administrator to make this amendment. We disagree. Rule 821.12(a) of the Board's Rules of Practice, 49 CFR Part 821, permits a party to amend a pleading any time more than 15 days prior to the hearing. Furthermore, Nelson was on notice of the allegations, since the order alleged revocation and implicitly alleged that there was a lack of qualification. Administrator v. Derrow, NTSB Order No. EA-3590 at 5 n.5 (1992).

The order filed against respondent Olsen did contain the allegation that as a result of the conviction, he lacked the care, judgment, and responsibility to hold an airman certificate.

Both respondents also moved to dismiss the complaints as stale under Rule 821.33. The law judge correctly denied this motion. Id.

⁶Respondents object to the consideration of the deposition testimony of their co-conspirator, because it was presented to the grand jury in order to obtain the indictments. The Administrator filed with the law judge an affidavit by the prosecuting attorney to the effect that the deposition testimony was obtained voluntarily and outside of the grand jury's presence. This evidence does not appear to be that which would be restricted in its use. In any event, our rules concerning the admissibility of evidence permit the admission of any relevant evidence. Respondents also contend that they were denied meaningful discovery because they were not given this deposition testimony until the Administrator filed his Motion for Summary Judgment. Respondents' contentions are unpersuasive. They do not assert that they were denied this information, and they admit they had it in sufficient time to respond to the Motion for Summary Judgment. As to respondents' contentions regarding the Administrator's responses to their Freedom of Information Act request for this evidence prior to the filing of the appeal, we are without jurisdiction to review the Administrator's actions

to Count I of the indictment, which charged in pertinent part that:

Beginning on or about November 1, 1986, and continuing through on or about July 1, 1988, within the Western District of Washington and elsewhere, NORMAN WILLIAM OLSEN,...[and] CURT ERIC HARRY NELSON, ...and others both known and unknown to the Grand Jury, did knowingly and intentionally conspire to import into the United States, from a place outside thereof, five (5) kilograms or more of a mixture or substance containing cocaine, a narcotic substance controlled under Schedule II, Title 21, United States Code, Section 812.

The Grand Jury further alleges that a Douglas C-118A (DC-6A) aircraft bearing the Federal Aviation Administration aircraft registration number N766WC and serial number 44597 was used to commit, or facilitate the commission of the offenses charged in Count I, Count VI, Count VII, and Count VIII of this indictment, and therefore shall be subject to forfeiture pursuant to Title 21, United States Code, Sections 853 and 963.

All in violation of Title 21, United States Code, Section 963.

Respondents raise eleven issues on appeal. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's order and the revocation orders. Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's revocation orders. For the reasons that follow, we deny respondents' appeal.

Most of respondents' arguments on appeal are premised on a fundamental misunderstanding of the provisions of the Federal Aviation Act and the FAA's regulations which form the basis of the complaint. Both the statute and the regulations mandate revocation of airman certificates because of drug-related

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under that statute.

convictions involving the use of aircraft, and Board precedent upholds these actions by the Administrator. See e.g., Administrator v. Hernandez, NTSB Order No. EA-3821 (1993); Administrator v. Correa, NTSB Order No. EA-3815 (1993); Administrator v. Beahm, NTSB Order No. EA-3769 (1993); Administrator v. Derrow, NTSB Order No. EA-3590 (1992); Administrator v. Kragness, NTSB Order No. EA-3682 (1992). Thus, where documentary evidence establishes the fact of the conviction, and the fact that an aircraft was used in the commission of the offense, no useful purpose would be served by holding an evidentiary hearing, because there remains no issue of fact. Summary judgment is therefore appropriate. See e.g., Administrator v. Kragness, NTSB Order No. EA-3682 (1992); Administrator v. Coulombe, 5 NTSB 2226 (1987).⁷

Respondents appear to believe, nonetheless, that because they pleaded guilty only to a conspiracy to import drugs, they are somehow immune from the provisions of FAAct and FAR § 61.15.

In Derrow, Order No. EA-3590 at 4, we found a similar argument unavailing. The statute and the regulations proscribe the underlying conduct--i.e., it is the importation of drugs, particularly when it involves the use of an aircraft, which Congress and the Administrator have determined is incompatible with the exercise of the privileges of an airman certificate. Accordingly, the fact that respondents pleaded guilty to

⁷Nor is the sanction of revocation excessive. Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989).

conspiracy rather than the offense of importation, is irrelevant to the Administrator's enforcement action.

We have reviewed respondents' other allegations of procedural error, and we can perceive none which caused any harm to them in the effective prosecution of their appeals. For example, respondents filed a motion for continuance in which they requested a complete set of the FAR, a complete set of all NTSB opinions and orders pertaining to aviation, Title 49 of the United States Code, and a copy of FAA Order 2150.3, Compliance and Enforcement Handbook. Respondents argued in the motion that they were entitled to a 180-day continuance, so that these materials, which were not in their prison's library, could be provided to them by either the Administrator or the NTSB. The materials were apparently not provided, and the law judge denied the motion for continuance, finding that good cause had not been shown. In the appeal before us, respondents argue that as a result, they were denied the right to "appointed counsel," "equal protection," and "due process." We disagree. Constitutional protections which are afforded to defendants in criminal proceedings do not attach to enforcement proceedings, which are civil in nature. Nor do the provisions of the Administrative Procedure Act require either the Board or the Administrator to comply with such a request. Moreover, the record shows that respondents did have the Federal Aviation Act, the Board's Rules of Procedure, and access to published decisions of several Federal Courts of Appeals dealing with the statute and

regulations which formed the basis of the complaint. In the Board's view, the law judge did not abuse his discretion in finding that respondents' claim that they could not have a fair hearing without having these other materials available to them, was not good cause for a continuance.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied; and
2. The Administrator's orders of revocation are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.